SURETYSHIP AT "LAW MERCHANT"

DOES the "law merchant" include any of the doctrines of suretyship, and can any incident of suretyship attach to a negotiable instrument?

In its report to the Conference of Commissioners on Uniform State Laws at the Washington meeting in 1914, the Committee on Uniformity of Judicial Decisions in Cases Arising Under Uniform Laws discusses at some length the failure of courts to make uniform application of the provisions of the Uniform Negotiable Instruments Act.[1] It finds that this failure has been due principally to lack of knowledge of the "law merchant," quotes from a number of decisions giving judicial sanction to the purpose of the uniform statute, and summarizes:

"With all due respect to the learning of the lawyers and the judges of our country candor calls upon us, in the performance of the duty of writing this report, to call attention to the evidence furnished by these decisions of cases under the Uniform Negotiable Instruments Law, that many of the counsel therein and many of the judges in their opinions are more imbued with the spirit of the common law than with the spirit of the 'Law Merchant.' The word 'surety' is not to be found even once in the uniform statute under consideration, yet counsel, in their briefs and arguments, as well as judges in their opinions, speak constantly of certain parties to the cases as being sureties. It is a common law term, unknown to the 'Law Merchant.' This carrying over into the field of the 'Law Merchant' the use of terms of the common law shows that the lawyers and judges have not learned to think in terms of the 'Law Merchant' when dealing with questions under the 'Law Merchant,' but think and therefore reason as if they were still dealing with questions under the common law. It is this obliteration or ignoring of the distinction between two different systems that leads the judges in many of these cases, including some above cited, to speak of 'the common law of negotiable instruments,' meaning the 'Law Merchant.' We do not speak of the common law of equity, nor of the common law of admiralty. The 'Law Merchant,' like equity, is not a part of the common law; it is a

[1] 1 AM. BAR ASS'N. J. 24–49.

separate system of law. As Bigelow says in 'The Law of Bills, Notes and Checques' p. 5:

"'The mischief lies in the mistaken notion implied, that the "Law Merchant" is a sort of poor relation of the common law, subject to it wherever its own language is not plain. Such instances, in other words, overlook the fact that the "Law Merchant" is an independent parallel system of law, like equity or admiralty. The "Law Merchant" is not even a modification of the common law; it occupies a field over which the common law does not and never did extend.'

". . . These are but stray samples of the evidence furnished by an examination of early statutes and early cases on bills and notes in the states of our union, that show an ignorance of the principles of the 'Law Merchant' out of which some have not yet entirely emerged. To secure uniformity in decisions under the Uniform Negotiable Instruments Act there must be more intimate knowledge of the 'Law Merchant.' "[2]

The foregoing views the conference, approving the report, made its own. This insistence upon a uniformity which shall confine itself strictly to the language of the Uniform Act, and which by its operation will eliminate suretyship from the "law merchant" as expressed in the uniform statute, obtains some additional emphasis from the address of President Charles Thaddeus Terry of the conference at its 1915 meeting,[3] and from a prize essay by Mr. Jacob Sicherman of the Buffalo Law School, reprinted by request of the conference in a recent issue of the *American Bar Association Journal*.[4] Such insistence seems to proceed upon the triple hypothesis that suretyship was unknown to the "law merchant," that the Uniform Act, codifying the "law merchant," likewise excludes it, and that whether it be found in the "law merchant" or not, the Uniform Act excludes and abrogates it by failing to include it. To consider, with due respect to the conference and to the eminent text-writer its committee quotes, what soundness these views possess, is the object of this discussion.

Upon these views the first and most obvious commentary is suggested by the reference to the "law merchant" as in all respects separate from and unmodified by the common law. That the custom of merchants, within its limited field, was at one time independ-

[2] 1 AM. BAR ASS'N. J. 41–43.

[3] 40 REPORTS OF THE AMERICAN BAR ASSOCIATION, 919–48.

[4] "Construction of Clause in Uniform State Laws Providing for Uniformity of Interpretation," 2 AM. BAR ASS'N. J. 60–79.

ent of, or even to some extent coördinate with the common law may or may not be true. It is distinct from the latter at least to this extent, that the custom of merchants, devised by the cosmopolitan traders of the Middle Ages, was in both inception and growth less local in scope than the common law, and has always been administered, for the sake of that uniformity in commercial transactions at which the Uniform Act itself aims, generally and not locally. But to say that it ever did or now does constitute a separate system corresponding to admiralty or equity is to go farther than even Chancellor Kent [5] and others who have viewed the "law merchant" as lying outside the common law have ever gone. Such statement, if made in earnest, rests upon a misconception of the principles of the "law merchant" fully as profound as that of the courts to whose "ignorance" and lack of uniformity the conference cites us. On the contrary, the "law merchant," long before the first suggestion of a Uniform Negotiable Instruments Act, had been incorporated into and become part of the great body of common-law rights and remedies. Even Blackstone so defines it:

"The second branch of the unwritten laws of England are particular customs, or laws which affect only the inhabitants of particular districts.

"To this head may most properly be referred a particular system of customs used only among one set of the king's subjects, called the custom of merchants, or *lex mercatoria:* which, however different from the general rules of the common law, is yet engrafted into it, and made a part of it; being allowed, for the benefit of trade, to be of the utmost validity in all commercial transactions; for it is a maxim of law, that '*cuilibet in sua arte credendum est.*' " [6]

In another portion of his work there appears a discussion of negotiable instruments and of the "rules of common law" in connection therewith [7], an error on Blackstone's part almost as deplorable as that of the courts who have been criticised for discussing the "common law of negotiable instruments." No more than any other law of custom has the "law merchant" ever arisen to the dignity of procedure, process, or tribunal of its own; and, in the present state of the law at least, a court of law merchant would be an anomaly as great as a "common law of equity" or a "common law of admiralty." [8] In short, it is inaccurate to say that the cus-

[5] 3 KENT, COMM. 2. [6] 1 BL., COMM. 74–75. [7] 2 *Id.*, 467–70.

[8] See the quotation from the conference report, *ante.*

tom of merchants, however controlling in commercial transactions, is a separate system of law, or that the common law does not extend to it, exactly as it would be inaccurate to say of any other set of customs, become law through long observation and usage, that it is separate from or unmodified by the legal system into which it has been incorporated and of which it has become a part.

There is nothing, then, in the relation of the "law merchant" to the other parts of our legal system, to deny suretyship a place in it. A more fatal flaw in the objection to such suretyship, however, is the fact that the effect of the Uniform Negotiable Instruments Act has not been to remove suretyship from the law of negotiable instruments, nor even to correct an erroneous judicial impression, based upon "ignorance of the principles of the law merchant," that suretyship ever had a place in such law. In this connection it is unnecessary to examine the decisions holding that certain parties to negotiable instruments are "sureties" [9] or "in effect sureties," [10] or the cases equally numerous holding that certain parties may be proved sureties by evidence *aliunde*, even if the instrument itself does not indicate such relation.[11] Nor is it necessary to trace any adoption or transference of the relation from one "legal system" into another. The courts' use of the term in connection with commercial paper being admitted, the question is whether or not such use has any basis in logic. To examine contracts of suretyship and negotiable instruments and, testing them by their resemblances, determine as nearly as possible on first principles whether or not any incidents of the one might in the natural course of things be expected to attach to the other, is the more rational method of approaching this question.

To do this, we need a major premise. What is a contract of surety-

[9] For example: Deering *v.* Lord Winchelsea, 2 B. & P. 270 (1800); Good *v.* Martin, 95 U. S. 90 (1877); Guild *v.* Butler, 127 Mass. 386 (1879); Flour City Nat. Bank *v.* McKay, 86 Hun 15, 33 N. Y. Supp. 365 (1895); Morehead *v.* Bank, 130 Ky. 414, 419, 113 S. W. 501, 23 L. R. A. (N. S.) 141 (1908).

[10] Lock Haven State Bank *v.* Smith, 85 Hun 200, 32 N. Y. Supp. 999 (1895); Byers *v.* Coal Co., 106 Mass. 131 (1870); Gunnis *v.* Weigley, 114 Pa. St. 191, 6 Atl. 465 (1886).

[11] Denton *v.* Peters, L. R. 5 Q. B. 475 (1870); Good *v.* Martin, *supra;* Patch *v.* Washburn, 16 Gray (Mass.) 82 (1860); Pursifull *v.* Banking Co., 97 Ky. 154, 30 S. W. 203 (1895); Oriental Financial Corporation *v.* Overend, L. R. 7 Ch. 142 (1876), aff'd L. R. 7 H. L. 348 (1874); Bailey *v.* Edwards, 4 B. & S. 761 (1864); Coulter *v.* Richmond, 59 N. Y. 478 (1875).

ship, and what are its primary characteristics? The answer appears, roughly stated, in the Statute of Frauds: "'. . . a promise to answer for the debt, default, or miscarriage of another," though this definition is perhaps too general, as including also guaranty. Lord Selborne, after classifying by itself technical suretyship — *i. e.*, the agreement to constitute for a particular purpose the designated relation of principal and surety — defines suretyship in the general sense as the relation which arises where, without any such technical contract of suretyship, there is a primary and secondary liability of two persons for the same debt, the debt being, as between the two, that of one only and not equally of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid.[12] In other words, a surety is a party who will have to pay or perform if the party who really ought to pay or perform fails to do so, yet whose obligation so to perform is as to the obligee immediate and primary, not dependent upon any exhaustion of remedy against the principal debtor.

Obligations similar to this one, it needs no searching examination to see, are imposed by certain contracts very frequently made with reference to commercial paper. Such is the obligation of the "anomalous" or "irregular" indorser — the signer not otherwise a party, who puts his name on the back of the instrument before delivery. Such also is that of the "accommodation" party, who signs as maker, acceptor, drawer, or indorser, not as a recipient of value, but merely to lend credit to and for the "accommodation" of the party to whom the consideration actually runs. Obviously the undertaking of both the anomalous and the accommodation party is to pay the instrument if the party actually responsible does not, this obligation being as to the holder absolute, in that the latter is not required first to exhaust his remedy against the party actually responsible, yet as between the credit-lender and the actual recipient of value strictly the latter's obligation. Even the ordinary indorser's contract has in it something of this element, and like that of the accommodation or anomalous party suggests to the mind, by

[12] Duncan, Fox & Co. *v.* North & South Wales Bank, 6 App. Cas. 1, 11 (1880). De Colyar adopts this definition of suretyship (or "guarantees") generally. LAW OF GUARANTEES AND OF PRINCIPAL AND SURETY, 3 ed., 65–161; 12 ENCY. BRIT., 11 ed., 652. Mr. Chief Justice Cooley, in Smith *v.* Shelden, 35 Mich. 42, 47 (1876), uses almost identical language.

its very nature, the notion of suretyship. As the Supreme Court of Georgia has remarked, there is an element of suretyship in every unqualified indorsement of a negotiable instrument.[13] In view, however, of the holding of Judge Collin, that the indorsement in due course is an independent contract, entered into not to secure the payee but to obtain a transfer of the instrument, and to which no "secondary" liability such as that of a surety can attach,[14] the ordinary indorser's obligations need not concern us here.

These resemblances, as study of decisions shows, are the real basis of judicial application to both the anomalous and the accommodation party's obligations at "law merchant" of the doctrines of suretyship. Thus Mr. Chief Justice Shaw says of the liability of the anomalous indorser:

"He is not liable as indorser, for the note is not negotiated or title to it made through his indorsement, nor as guarantor, because there is no separate or distinct consideration; but he means to give security and validity to the note by his credit and promise to pay it if the promisor does not, and that upon the original consideration, and therefore he is a promisor and surety. . . . This is the legal import and effect of such a note, independent of any extrinsic evidence."[15]

By a similar process of reasoning Mr. Chief Justice Gray, in the conspicuous case of *Guild* v. *Butler*,[16] views the liability of an accommodation party as that of a surety; while in *Duncan, Fox & Co.* v. *North & South Wales Bank*,[17] the capsheaf of a shock of decisions on the subject, Lord Selborne applies directly to accommodation parties his definition of suretyship, and holds that the resemblance between the relationships justifies giving to accommodation parties the equities of sureties, in so far as those equities do not interfere with the necessities of commercial intercourse.

This recognition of fundamental resemblance the courts have consistently followed up by imposing upon accommodation parties liabilities, and granting them rights, similar to those of sureties. For example, the accommodation party like the surety having agreed to pay the debt, like the surety he is absolutely and "prima-

[13] Tanner *v.* Gude, 100 Ga. 157, 27 S. E. 938 (1896).
[14] Blanchard *v.* Blanchard, 201 N. Y. 134, 94 N. E. 630 (1911).
[15] Chaffee *v.* Jones, 19 Pick. (Mass.) 260, 263 (1837).
[16] 127 Mass. 386 (1879).
[17] 6 App. Cas. 1 (1880).

rily" liable to the payee or holder in due course, even though as between him and the party accommodated he may be only "secondarily" liable. Hence the holder is not required first to exhaust remedies against the accommodated party, but may proceed against all signers, whether for value or for accommodation, jointly. Since the latter signs not as a recipient of value but as a lender of credit, like the surety he is entitled to the benefit of the implied contract of indemnity between him and the party to whom his credit is loaned. Finally, since he is in no respect a beneficiary of the contract represented by the instrument, like the surety he is favored in equity, and not only subrogated to any rights acquired by the holder against the beneficiary, but also released by any act of a holder with knowledge of his accommodation character, and especially of a payee where the question arises between the original parties to the instrument, releasing or impairing his remedy against the real maker.

These rules of law require repetition, not because they are not so universally accepted as to be elementary, but to show the extent to which the resemblances between the contract of suretyship and that of the accommodation party hold good. It is in the matter of the equities incident to both contracts that the courts most consistently follow up these resemblances. The rule as to release of the surety is not part of the " common law of suretyship," any more than that as to release of the credit-lender is part of the "common law of negotiable instruments." Both rules, like subrogation and other doctrines governing tripartite relations like these, had their origin in equity, and were not originally part of the common law of either suretyship or negotiable paper. They rest upon the broad equitable principle, sufficiently axiomatic to require no justification here, that one in possession of full knowledge of all facts surrounding a transaction, and of the means of protecting all parties to it, is bound to apply such means to the other parties' protection as well as his own, and by virtue of such application acquires for the others the same rights as he does for himself.

The relation between holder (especially original payee), maker, and accommodation party may therefore be said to have an analogue in that between obligee, principal, and surety. Certainly, on first principles again, the analogy goes far enough, and the situations of the parties are sufficiently similar, to warrant the conclusion that the equities which release or protect the accommodation party

ought to be the same as those which release or protect the surety. Courts have therefore avoided the necessity of creating a new terminology, by placing the limited class within the general class which it most strongly resembles, and referring to the accommodation party as a surety. Indeed, this interchange of terms is probably the only basis for the impression that they have attempted to create a blend of "legal systems," or to ingraft upon the law of negotiable instruments all the legal theories of suretyship. That impression, while perhaps natural, is erroneous. To yield to it would be to make the whole law of accommodation paper depend upon questions of terminology.

Moreover, a closer scrutiny of judicial decisions will dissipate it. As we have noted, the enforcement, with respect to accommodation paper, of the equities of suretyship, is justified by the obvious resemblances between the respective situations of the accommodation party and the surety. The effect of denying to the former these equities must then be to make him absolutely liable to a holder with full knowledge of his accommodation character, regardless of the relations between the holder and the party who received value, or of the situation with respect to the last-named party in which the negligent or wrongful act of the holder may have left him. The repugnance to every equitable principle of such absolute and unprotected liability needs no exposition; and courts construing the "law merchant" have not hesitated to apply the equities suggested by the surety's analogous situation, and protect the lender of credit accordingly. Nor, in view of the peculiarities of the latter's contract, can such application be considered as ill-reasoned as the criticism of it would indicate. In fact, it must in all seriousness and with due respect to both critic and criticised be said that these judicial decisions, declaring the equities of concrete facts rather than conclusions from abstract premises, endure examination much better than do most of the strictures laid upon them. As the old-fashioned dominie said of Holy Writ, they "shed great light upon the things which commentators have written about them."

The foregoing conclusions do not overlook the fact that in a proper case at "law merchant" the anomalous or accommodation party may be held otherwise than as a surety, or that the peculiarities of commercial paper may disentitle such party to some of the privileges of suretyship. That the "law merchant" so far recog-

nized the resemblances between the contract of a surety and that of an accommodation party as to adopt from equity for the latter's benefit the same doctrines of which the former might take advantage — this, at least, we are justified in saying. The succeeding question is, What effect has the Uniform Negotiable Instruments Act, now the law of forty-seven American jurisdictions, upon this phase of the credit-lender's liability?

If we accept literally the suggestion that the Uniform Act "codified the 'Law Merchant,'" [18] obviously under the act the accommodation party is as much entitled to the equities of suretyship as ever he was. The fact that courts construing the Act have, rightly or wrongly, withheld some of these equities suggests at the start that there must be some error in, or at least some judicial misunderstanding of, that suggestion.

Section 29 of the Uniform Act defines an accommodation party and his liability as follows:

"An accommodation party is one who has signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party." [19]

As to irregular indorsements, the Act provides (Section 64):

"Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery he is liable as indorser, in accordance with the following rules:

"(1) If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

"(2) If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

"(3) If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee." [20]

Section 192 defines "primary" and "secondary" liability as follows:

---

[18] See the quotations embodied in the conference report, 1 AM. BAR ASS'N. J. 26–36.

[19] AMERICAN UNIFORM COMMERCIAL ACTS, p. 145. (The official edition, prepared and recommended by the Conference of Commissioners on Uniform State Laws.)

[20] *Id.*, 152–53.

"The person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are 'secondarily' liable."[21]

And following are the provisions (sections 119 and 120 of the Act) for discharge of negotiable instruments:

"A negotiable instrument is discharged:

"(1) By payment in due course by or in behalf of the principal debtor;

"(2) By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;

"(3) By the intentional cancellation thereof by the holder;

"(4) By any other act which will discharge a simple contract for the payment of money;

"(5) When the principal debtor becomes the holder of the instrument at or after maturity in his own right.

"A person secondarily liable on the instrument is discharged:

"(1) By any act which discharges the instrument;

"(2) By the intentional cancellation of his signature by the holder;

"(3) By the discharge of a prior party;

"(4) By a valid tender of payment made by a prior party;

"(5) By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;

"(6) By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."[22]

The first effect of these provisions, without going into the reasons for it, has been to make the accommodation maker or acceptor liable to pay at maturity without notice of dishonor and protest, or any other formality necessary to charge an indorser in due course;[23] and the accommodation indorser liable in all cases as an indorser "at 'law merchant,'" entitled to the benefit of all these same formalities.[24] In other words, one has become "primarily" and the other "secondarily" liable, in the Uniform Act sense of those terms.

Using this holding as one premise, and the fact that extension of

---

[21] AMERICAN UNIFORM COMMERCIAL ACTS, p. 183.

[22] *Id.*, 165.

[23] Hunter *v.* Harris, 63 Ore. 505, 127 Pac. 786 (1912); Lumbermen's Nat. Bank *v.* Campbell, 61 Ore. 123, 121 Pac. 427 (1912); Cellers *v.* Meachem, 49 Ore. 186, 89 Pac. 426 (1907).

[24] Deahy *v.* Choquet, 28 R. I. 338, 67 Atl. 421 (1907).

time of payment is included in Section 120 of the Act and omitted from Section 119 as the other, many courts have held that an accommodation maker is not released under the Uniform Act, as he was at "law merchant," by an extension of time by the holder to the real maker.[25] Probably the most conspicuous of these cases is *Union Trust Co.* v. *McGinty*,[26] one of the mainstays of the conference's argument aforesaid,[27] and cited by Mr. Sicherman as the "best expression" of the purpose and effect of the Uniform Act.[28] Mr. Chief Justice Rugg's remark in that case as to the Uniform Act's failure to mention suretyship [29] is likewise the most conspicuous of the similar judicial utterances which have formed the basis of the conference's conclusion that the Act has removed suretyship from the law of negotiable instruments, whether the "law merchant" recognized suretyship or not.

If the Chief Justice's statement were more than *dictum*, unnecessary to the judgment the court reached, perhaps we might concede that he hints at such conclusion. As the facts stand, however, his language has received an interpretation altogether too broad. To say that the effect of the Uniform Act is on the one hand to make every party to a negotiable instrument liable in accordance with its terms, regardless of the equities existing between the parties, and

---

[25] Cowan *v.* Ramsey, 15 Ariz. 533, 536, 140 Pac. 501 (1914); Vanderford *v.* Bank, 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.) 129 (1907); Cellers *v.* Meachem, 49 Ore. 186, 89 Pac. 426; Wolstenholme *v.* Smith, 34 Utah 300, 97 Pac. 329 (1908); Bradley Engineering, etc. Co. *v.* Heyburn, 56 Wash. 628, 106 Pac. 170 (1910); National Citizens' Bank *v.* Toplitz, 81 N. Y. App. Div. 593, 81 N. Y. Supp. 422; Richards *v.* Market Exchange Bank Co., 81 Ohio St. 348, 90 N. E. 1000, 26 L. R. A. (N. S.) 99 (1910); Fritts *v.* Kirchdorfer, 136 Ky. 643, 650, 124 S. W. 882 (1910); Lane *v.* Hyder, 163 Mo. App. 688, 147 S. W. 514 (1912); Night & Day Bank *v.* Rosenbaum, 191 Mo. App. 559, 177 S. W. 693 (1915). *Cf.* Fullerton Lumber Co. *v.* Snouffer, 139 Ia. 176, 117 N. W. 50 (1908); Goldberg & Louis *v.* Stone, 10 Ala. App. 485, 65 So. 454 (1914).

[26] 212 Mass. 205, 98 N. E. 679 (1912).

[27] 1 AM. BAR ASS'N. J. 33.

[28] 2 AM. BAR ASS'N. J. 72.

[29] "Approaching the act from this point of view, it is apparent that no relation of principal and surety is established or contemplated by any of its sections. It determines the liability of the various parties to the negotiable instrument on the basis of that which is written on the paper. The obligation of all makers, whether for accommodation or otherwise, is to pay to the holder for value according to the terms of the bill or note. Their obligation is primary and absolute." 212 Mass. 207, 98 N. E. 680. The foregoing, with other portions of the opinion, is quoted with approval in Cowan *v.* Ramsey, 15 Ariz. 533, 536, 140 Pac. 501. See also the dissenting opinion of Sturgis, J., in Long *v.* Shafer, 185 Mo. App. 641, 650, 171 S. W. 690, 694 (1914).

on the other to exclude evidence as to what those equities are, is to ignore the essential characteristics not only of suretyship, but also of the credit-lender's contract. It is to confuse the two meanings of those abused terms "primary" and "secondary." In one, the strict "law merchant" sense, primary liability is that of a party not entitled to the formalities necessary to charge an indorser; secondary liability is that of a party so entitled. This special meaning of the terms is of course due to the peculiarities of mercantile custom, a party secondarily liable being in a sense entitled, before he can be held, to have ordinary commercial methods of collection exhausted against parties primarily liable.[30] In another, the equitable sense, primary liability is that of the beneficiary of the contract — in a negotiable instrument contract the party who has received value; secondary liability that of the party who, as between himself and the party primarily liable, is entitled to reimbursement if he be compelled to pay. In other words, primary and secondary liability in the "law merchant" sense depend upon and are part of the contract expressed in the instrument itself; in the equitable sense they arise collaterally out of the accommodated party's implied liability to reimburse his credit lender. So far as the instrument itself is concerned the holder need not regard this collateral matter; it is his knowledge of it, and his disregard of or interference with it notwithstanding knowledge, which bring the accommodation party's equities, like the surety's, into play.

This being true, it is fallacious to base upon the Uniform Act's definition of the liabilities arising out of the signatures to the instrument itself, or upon the Act's mere failure to mention suretyship, a statement that no incident of suretyship can attach to a negotiable instrument. This distinction between the rights defined by the terms of the instrument and the equities which may nevertheless attach is discussed with especial clarity in one or two of the decisions establishing the "law merchant" as to this proposition. We have already referred to *Duncan* v. *Bank*.[31] An earlier and not less conspicuous case is equally explicit:

[30] "The terms 'primary' and 'secondary,' when they apply to the parties to an obligation, 'refer to the remedy provided by law for enforcing the obligation, rather than to the character and limits of the obligation itself.' Kilton *v.* Prov. Tool Co., 22 R. I. 605, 48 Atl. 1039." Ellsworth, J., in Northern State Bank *v.* Bellamy, 19 N. D. 509, 514, 125 N. W. 888 (1910).

[31] 6 App. Cas. 1 (1880).

"In the case of *Hollier* v. *Eyre*[32] Lord *Cottenham*, in delivering his opinion in the House of Lords, laid down the rule of law relied upon by counsel for the plaintiff in the argument before us, that 'the question whether the plaintiff as between himself and the grantees was a principal in the grant of the annuity, or only a surety for the payment of it by another, must be ascertained by the terms of the instruments themselves: no extraneous evidence,' said he, 'is admissible for that purpose.' In this doctrine we entirely concur; and we think that, if the discharge of the surety could only be effected by establishing that there was a different contract as between the creditor and the alleged surety from that apparent on the written contract, as for instance that the latter would be liable, not primarily but collaterally only, on the default of the principal debtor, we should be satisfied that the defence was not made out. It remains, however, to consider whether, assuming the contract, as between the creditor and the parties contracting with him, to be, as apparent on the face of the written document, a primary and not a collateral liability, an equity does not arise from the relationship of the principal and surety inter se known to the creditor. . . . From those passages it seems to us that the rule, as laid down by Lord *Cottenham* in the House of Lords, may be inferred to be that equities such as that which we are discussing may arise, dehors the written agreement, from the relation of the principal and surety inter se if known to the creditor, and that such knowledge may be proved either from what appears on the face of the written instrument or from evidence aliunde."[33]

Mr. Chief Justice Shaw puts the same proposition as follows:

"The presumption, that two or more promisors of a note are equally responsible for its ultimate payment, so that if one pays the whole he shall have contribution, may be rebutted by showing that one signed for the accommodation and as surety for the other. . . . So, where one of two promisors annexes the word 'principal' to his signature, and the other 'surety,' these descriptions do not affect the terms or legal effect of the contract, they are equally bound to the promisee or indorsee as if such words of description had not been annexed. They indicate the relation in which the parties stand to each other, and notice of such relation to the holder. But the fact of such relation, and notice of it to the holder, may, we think, be proved by extrinsic evidence. It is not to affect the terms of the contract, but to prove a collateral fact and rebut a presumption. It goes to show, that the defendant was in fact a surety; and the rights of contribution result accordingly."[34]

[32] 9 Cl. & Fin. 1, 45 (1840).

[33] Coleridge, J., in Pooley *v.* Harradine, 7 El. & Bl. 431, 434 (1857).

[34] Harris *v.* Brooks, 21 Pick. (Mass.) 195, 196 (1838).

So also Mr. Chief Justice Gray:

"The fact that one debtor is a surety for the other is no part of the contract with the creditor, but is a collateral fact showing the relation between the debtors, and, if it does not appear on the face of the instrument, this fact and notice of it to the creditor may be proved by extrinsic evidence. . . . As the right of the surety does not depend upon the contract, but upon the equities arising out of the circumstances of the case, the creditor is affected by knowledge of the true relation of the debtors, acquired at any time before he does the act which alters the position of the surety; and one who makes a promissory note for the accommodation of another is a surety, within the rule. . . . In this Commonwealth, the surety may avail himself of this equity in defence of an action at law against him."[35]

In other words, the discharge of the accommodation party by reason of the holder's disregard of the equities of the credit-lender's suretyship has nothing to do with "secondary" liability in the "law merchant" sense. Viewing the matter from this angle, it is evident that, even if the purpose of the Uniform Act is to secure uniformity in commercial transactions by making the instrument itself express the obligation of each party to it, that purpose has no effect upon the collateral contract of suretyship, or upon the equities arising from the holder's knowledge and disregard of such contract. As far as concerns the discharge of the accommodation maker by extension of time, the Act itself, including such extension among the causes for discharge of a party "secondarily" liable, and omitting it from the corresponding list for the instrument itself, may perhaps reasonably be held by its terms to furnish warrant for the abrogation of that defense[36] — though even that language of the Act may be a result of the aforementioned confusion between the two senses in which the terms "primary" and "second-

[35] Guild *v.* Butler, 127 Mass. 386, 389 (1879).

[36] But see BRANNAN, NEG. INST. LAW, 2 ed., 117, contending that the Act should not be construed as abrogating even this defense. "The discharge of a party who, though primarily liable, is known to the holder to be a surety, by giving time to the principal debtor, seems to be covered by section 119-4. But if this is not so, then, since the discharge of a surety-maker or surety-acceptor by an extension of time granted to the principal by a holder with knowledge of the relation, is neither a discharge of the instrument nor a discharge of a party secondarily liable, this must be regarded as an omitted case, and therefore to be governed by the law merchant under section 196."

ary" are used. But upon this revelation of implied legislative intention, and not upon the Act's failure to mention suretyship, the courts ought to base the accommodation maker's increased liability. It is enough to deprive him of the equity of which the Act itself may be construed as suggesting that legislatures in enacting it intend to deprive him.[37] The other equities of his peculiarly disadvantageous commercial and legal situation ought to remain in the "law merchant," codified or uncodified. The same is true of proof *aliunde* that such equities exist.[38] Farther than this the rule *expressio unius est exclusio alterius*[39] ought not to go.

In the application of this rule to the Uniform Act, moreover, we encounter another misconception, as far-reaching as that regarding "primary" and "secondary" liability. We have noted that the limitation of the defense of extension of time to parties "secondarily" liable may find some warrant in its inclusion in Section 120 alone, indicating that the drafters of the Act had it in mind and would have included it elsewhere had they intended it to apply to any other party's liability. But is there anything to indicate that

[37] See Fullerton Lumber Co. *v.* Snouffer, 139 Ia. 176, 117 N. W. 50 (1908), where the court evaded what it considered the harshness of the majority rule by a strict construction of the Act, limiting "holder" as used in the Act to holders for value, and discharging an accommodation maker because of time given the real maker by an original payee. Following this decision, as authority, one branch of the intermediate court of Missouri, in Long *v.* Shafer, 185 Mo. App. 641, 650, 171 S. W. 690 (1914), held the accommodation maker discharged by release of security by an original payee. On account of conflict with a prior decision of another branch of the court (Lane *v.* Hyder, 163 Mo. App. 688, 147 S. W. 514 (1912)), the case was certified to the Supreme Court of the state, where it is still pending. In a dissenting opinion Sturgis, J., said (185 Mo. App. 658, 171 S. W. 695): "Most, if not all, of the cases cited deal with the question of the release of the accommodation maker because of the holder making an agreement for the extension of time; and the majority opinion has not discussed, nor will I do so, whether or not a discharge by reason of the holder releasing securities held should be placed on a different basis as being a subject not treated of by the negotiable instruments act, and the further question of defendants' equitable rights against the holder, conceding that all parties to this note are makers and primarily and absolutely bound to its payment, because of his surrendering or appropriating to the payment of another note the security held by him from one of the makers of this note. See on this point Woods *v.* Finley, 153 N. C. 497, 69 S. E. 502."

[38] See the opinion of Chase, J., in Haddock *v.* Haddock, 192 N. Y. 499, 85 N. E. 682 (1908).

[39] Richards *v.* Bank, 81 Ohio St. 348, 90 N. E. 1000, 26 L. R. A. (N. S.) 99 (1910); Vanderford *v.* Bank, 105 Md. 164, 66 Atl. 47 (1907); Cellers *v.* Meachem, 49 Ore. 186, 89 Pac. 426 (1907); Cleveland Nat. Bank *v.* Bickel, 159 Pac. 302, 303 (Okla.) (1916).

they had in mind the accommodation party's other equitable defenses, or any of his equitable rights as against the holder, or that these, any more than his rights and remedies as against the accommodated party, of which there is no pretense that the Act deprived him, are impliedly excluded by the failure to include them? Such interpretation we can justify only by assuming that the Uniform Act is an attempted codification of the whole body of the "law merchant," by implication repealing whatever it omits.

It is true that some of the decisions quoted by the conference hint at such assumption.[40] A more logical view, however, Section 196 of the Act itself suggests:

"In any case not provided for in this act the rules of the law merchant shall govern."[41]

On its face this provision is compatible neither with the theory that the Act codifies the entire "law merchant," nor with the assumption that it necessarily sets aside or changes such rules of the "law merchant" as it fails specifically to mention. The commonsense view of it is not that it is an attempt to codify the entire law of commercial paper, or anything more than an effort in the direction of uniformity in commercial transactions, leaving matters not covered by it to the operation of the general "law merchant." Properly speaking, the rule *expressio unius* cannot apply to it at all. Even Mr. Chief Justice Rugg's remark, in discussing the purpose of the Act, that "it does not cover the whole field of negotiable instruments law,"[42] bears out this view.

---

[40] Brophy *v.* Wilson, 45 Mont. 489, 124 Pac. 510 (1912); Wisner *v.* Bank, 220 Pa. 21, 68 Atl. 955 (1908); Walker *v.* Dunham, 135 Mo. App. 396, 115 S. W. 1086 (1908); Trustees *v.* McComb, 105 Va. 473, 54 S. E. 14 (1906); Wirt *v.* Stubblefield, 17 App. D. C. 283 (1900).

[41] AMERICAN UNIFORM COMMERCIAL ACTS, p. 184.

[42] Union Trust Co. *v.* McGinty, *supra*. This is also the view of the leading critics of the Act. See the quotation from Professor Brannan's work on the Act, *supra;* also his suggestions for amendments to it. 26 HARV. L. REV. 588–600. See also the discussions of the Act by Professor Street, 11 LAW NOTES 105; Professor McGehee, 12 LAW NOTES 122; Professor H. H. McMahon, 80 LAW REPORTER 25; Professor McKeehan, 41 AM. L. REG. (N. S.) 437, 499, 561. The subject receives some attention, also, in the Ames-Brewster debate (14 HARV. L. REV. 241; 10 YALE L. J. 84; 14 HARV. L. REV. 442; 15 HARV. L. REV. 26; 16 HARV. L. REV. 255; BRANNAN, NEG. INST. LAW, 162 *seq*).

His earlier suggestion in the same opinion, as to the elimination of suretyship, therefore goes too far. So also does the conference report above quoted, for which his suggestion was a precedent. The Uniform Act does not codify suretyship *out of* the "law merchant," any more than it codifies a "law merchant" in which suretyship never belonged. On the contrary, it leaves such rules of suretyship as the "law merchant" has by analogy adopted, still operative in those cases involving commercial paper, to which the analogy applies.[43] As at least one court has suggested, the abrogation of the defense of extension of time may perhaps be justified not only by the terms of the Uniform Act, but also by the fact that such defense has always been at best a technical one, seldom based upon any real injury to the accommodation party.[44] Not so of surrender of security or release of funds or other acts of the holder with knowledge constituting positive neglect or wrong. To abolish the equities of the accommodation party's suretyship, therefore, is to ignore both the fundamental nature of his contract and the purpose of the Uniform Act. Such abolition the rule *expressio unius*, applied to the Act, alone justifies. The same reasoning which regards extension of time as a merely technical defense must condemn that rule, so applied, as also too technical for consonance with the spirit of equity which permeated the "law merchant" and which the Uni-

[43] Bean, J., in Hunter *v.* Harris, 63 Ore. 505, 513, 127 Pac. 786, 789 (1912), an action between accommodation parties. "In the examination of this question it is worthy of note that a surety on a negotiable instrument is not mentioned in the negotiable instruments law. This law provides that, in any case not provided for in the act, the rules of the law merchant shall govern."

The late Dean Ames, discussing subsections 120–5 and 6 of the Uniform Act, said: "There seems to be no sufficient reason, on the one hand, for inserting these doctrines of suretyship in a negotiable instruments code, or, on the other hand, if they are to be inserted, for omitting other doctrines of suretyship of equal importance." 14 HARV. L. REV. 241, 254; BRANNAN, NEG. INST. LAW, 175. He favored the dropping of these subsections, and the adding of a subsection providing for the release of the accommodation party if the holder with knowledge of the accommodation releases or gives time to the accommodated party.

Hon. Amasa D. Eaton, former president of the Conference of Commissioners on Uniform State Laws, addressing the conference in 1907, expressed agreement with the critics who contend with Professor Brannan, that the Act can be so construed as to harmonize with the established rules of suretyship. 31 REPORTS OF THE AMERICAN BAR ASSOCIATION, 1154, 1164. See also the discussion of the Act by Professor Crawford D. Hening, 59 U. OF PA. L. REV. 532, 542.

[44] Mason, J., in First National Bank *v.* Livermore, 90 Kan. 395, 398, 133 Pac. 734, 47 L. R. A. (N. S.) 277 (1913).

form Act, designed to remove minor differences and technical inequalities without changing general rules,[45] ought to strengthen rather than destroy.

Anan Raymond.

OMAHA, NEBRASKA.

[45] Mr. Chief Justice Winslow, in State Bank *v.* Michel, 152 Wis. 88, 139 N. W. 748, 749 (1913). Similar views are expressed in Columbian Banking Co. *v.* Bowen, 134 Wis. 218, 114 N. W. 451 (1908); Campbell *v.* Bank, 137 Ky. 555, 126 S. W. 114 (1910); and by Mr. Chief Justice Rugg in Fourth Nat. Bank *v.* Mead, 216 Mass. 521, 523, 104 N. E. 377, 52 L. R. A. (N. S.) 226 (1914); and Liberty Trust Co. *v.* Tilton, 217 Mass. 462, 466, 105 N. E. 605, L. R. A. 1915B, 144, 148.